Beside this Court's definition, Plaintiffs also point to other indicia used by courts when determining whether a charge is considered a "rate." For example, charges based on units of time may indicate the charge is considered a rate. *See Ball v. GTE Mobilnet*, 81 Cal. App. 4th 529, 538 (2000) (noting that the "element of time can no more be divorced from rate than a clock from its hands"). In contrast, where a challenged billing practice has only a tangential relationship to the actual rates for service paid by customers, some courts have held that the charge is not a rate. *See In re Comcast Cellular Telecommunications Litigation*, 949 F. Supp. 1193, 1201 (E.D. Pa. 1996) (noting that several courts have found state claims challenging the fairness of a billing practice not completely preempted where the billing practices at issue "had only a tangential relationship to the actual rates for service paid by customers"). Under similar reasoning, several courts have determined in published opinions that early termination fees do not constitute rates. *See, e.g., Esquivel v. Southwestern Bell Mobile Sys., Inc.*, 920 F. Supp. 713, 715 (S.D. Tex. 1996); *Phillips*, 2004 U.S. Dist. LEXIS 14544, at *36; *Iowa v. United States Cellular Corp.*, No. 4-00-CV-90197, 2000 U.S. Dist. LEXIS 21656 (S.D. Iowa Aug. 7, 2000); *Cedar Rapids Cellular Tel., L.P. v. Miller*, No. C00-58 MJM, 2000 U.S. Dist. LEXIS 22624, at *21 (N.D. Iowa Sept. 15, 2000) (all declining to read "rate" so broadly as to preempt completely plaintiffs' claims that early termination fees violate state consumer protection laws). Plaintiffs rely on these cases to support their argument that the reconnect fee should similarly not be considered a rate. Taking these other indicia into consideration, the Court finds further evidence that the reconnect fee bears qualities that distinguish it from a rate within the meaning of Section 332. Unlike the typical monthly rates charged to mobile services customers, the reconnect fee is allegedly only charged in the event that a customer's account is suspended. (TAC at ¶ 22.) Thus, it is not charged in the normal course of the customer's relationship with Verizon Wireless. Moreover, the reconnect fee, as Plaintiffs point out, is buried in the "Terms and Conditions" portion of the Customer Agreement, unlike the monthly rate plans advertised by Verizon Wireless. (TAC at ¶ 11; Ex. B.) Thus, the reconnect fee, like early termination and late fees, similarly bears only a tangential relationship to the actual rates charged for mobile services. This, together with the narrow construction of "rate," indicates that the reconnect fee

cannot be accurately described as a rate.

Finally, Verizon Wireless analogizes the reconnect fee to the activation fee charged to customers when they initially sign up for wireless service. Verizon Wireless argues that because the FCC recognizes activation fees as part of the "price" for cellular service, the reconnect fee is likewise a "price" for service, and therefore should be considered a rate. (Mot. at 13.) The FCC cases cited by Verizon Wireless do not explicitly find either activation fees or reconnect fees to be "rates." Rather, the FCC has only referred to activation fees in the context of cellular prices. *See In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 10 F.C.C.R. 8844, 8868 at ¶ 70, 1995 WL 1086279 (F.C.C. Aug. 18, 1995) (noting activation "fees" may be part of "cellular prices"); *see also In the Matter of Petition of California and the Pub. Utilities Comm'n to Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 F.C.C.R. 7486, 7540 at ¶ 122, 1995 WL 314451 (F.C.C. May 19, 1995) (referring to activation fees in the context of cellular prices). Thus, while the FCC has discussed activation fees in the context of mobile service prices on at least two occasions, it does not necessarily follow that the FCC considers activation fees, and based on Verizon Wireless's argument, reconnect fees, as rates under Section 332. Given the narrow construction of the term, the Court is reluctant to adopt this reasoning.

Notwithstanding the fact that the FCC has not explicitly defined "rate" to encompass activation fees, such fees are sufficiently distinct from the reconnect fee at issue here. Activation fees, as alleged by Plaintiffs, are charged at the start of a mobile services contract to all customers entering into a contract with Verizon Wireless. In contrast, reconnect fees are only charged to customers whose service has been suspended, but are still under contract, in order to resume normal service. In light of the foregoing discussion and these differences, the Court is not persuaded by Verizon Wireless's activation fee analogy. To conclude, considering the qualities of the reconnect fee and the narrow construction of the term "rate" in this context, the Court finds the reconnect fee is not a rate within the meaning of Section 332. Instead, the reconnect fee more accurately falls within the "other terms and conditions" not preempted by Section 332.

C. The Reconnect Fee is Liquidated Damages.

Having found that the reconnect fee is not a rate and that Plaintiffs' state law claims are not preempted by Section 332, the Court must determine whether Plaintiffs' second cause of action, alleging violation of California Civil Code section 1671 ("Section 1671") should be dismissed for failure to state a claim. Section 1671 provides, in pertinent part: "[A] provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." Cal. Civ. Code § 1671(b). Whether a contractual provision is an unenforceable liquidated damages provision is a question for the court. *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1314 (2005) (quoting *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1383, 1393 (1991) (quotation marks omitted)). Verizon Wireless contends Plaintiffs fail to allege that the reconnect fee is charged in order to remedy a breach of the customer's contractual obligation, and therefore fail to state a claim under Section 1671. (Mot. at 6.) Plaintiffs, on the other hand, contend that the reconnect fee charged pursuant to the Customer Agreement is an illegal penalty because the $15 amount charged far exceeds the damages caused by late-paying customers, and therefore fails to reflect a reasonable effort to estimate such damages. (TAC at ¶¶ 1, 24-26, 39-40.)

In order to maintain a Section 1671 claim, Plaintiffs must allege sufficient facts demonstrating that the reconnect fee constitutes liquidated damages. California courts define liquidated damages as "an amount of compensation to be paid in the event of a breach of contract, the sum of which is fixed and certain by agreement." *Chodos v. West Publ'g Co.*, 292 F.3d 992, 1002 (9th Cir. 2002). Thus, to constitute liquidated damages, the contractual provision must: (1) arise from a breach, and (2) provide a fixed and certain sum. *Id.* The parties disagree as to whether breach triggers the imposition of the reconnect fee. Verizon Wireless argues the triggering event is not the act of nonpayment, but the customer's choice to reactivate their mobile services. Even if breach is determined to be the triggering event, Verizon Wireless argues the reconnect fee should still not be considered liquidated damages because it is not fixed and certain. The Court will address each of these issues in turn.

1. The Reconnect Fee is Triggered by Breach.

First, the Court must determine whether Plaintiffs allege sufficient facts to demonstrate that breach triggers the imposition of the reconnect fee. As alleged by Plaintiffs, the terms of the Customer Agreement state that "[p]ayment is due in full as stated on [one's] bill." (TAC at ¶ 10.) Under the Customer Agreement, Verizon Wireless reserves the right to impose late fees on unpaid balances, and it may also limit, suspend, or end service for good cause, including late payment more than once in any twelve months. (*Id.*) Finally, the Customer Agreement states that customers "may have to pay fees to begin service or reconnect suspended service." (*Id.*) The plain language of the Customer Agreement, provided by Plaintiffs in their complaint, demonstrates that nonpayment is breach under the terms of the contract. Moreover, this type of breach is necessary in order for a customer to be subject to reconnect fees.

Despite the fact that breach must occur in order for reconnect fees to be imposed, Verizon Wireless argues the reconnect fee should not be considered liquidated damages because the event triggering the imposition of the fee is the breaching customer's choice to reactivate service, not nonpayment. (Mot. at 7.) Plaintiffs counter that the reconnect fee is unequivocally imposed to penalize the customer and induce prompt payment of the unpaid balance. (Opp. Br. at 5-7.) Verizon Wireless relies on *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913 (1985), in support of its argument that the appropriate triggering event here is not breach. In *Perdue*, the California Supreme Court rejected a challenge to overdraft fees under Section 1671 on the basis that the act of writing a check with insufficient funds in one's bank account did not constitute breach. *Id.* at 932. There, the Court found that the bank customer never agreed to refrain from writing such checks, and as a result, the act did not constitute breach. *Id.* Plaintiffs fail to address this authority, but the Court nonetheless finds that the case is not controlling. In *Morris v. Redwood Empire Bancorp*, a California Court of Appeal explained that *Perdue* illustrated that "to constitute a liquidated damages clause the conduct triggering the payment must in some manner breach the contract." 128 Cal. App. 4th at 1315. Here, unlike *Perdue*, the customer's breach precedes the imposition of the alleged liquidated damages. As alleged by Plaintiffs, the Customer Agreement explicitly sets forth the actions that Verizon Wireless may pursue in the

event of nonpayment. One such repercussion may be having one's services suspended. (TAC at ¶ 10.) In order to resume normal service, a customer "may have to pay fees to ... reconnect suspended service." (*Id.*) The imposition of the reconnect fee is thus triggered by nonpayment, which, as stated above, Verizon Wireless concedes constitutes breach under the Customer Agreement. (Mot. at 2.)

Despite conceding that breach does in fact precede the imposition of the reconnect fee, Verizon Wireless maintains that the reconnect fee is triggered by alternative performance by the customer, rather than nonpayment, and therefore cannot constitute liquidated damages. "Performance cannot be said to be in the alternative where breach of a former covenant is necessary to give effect to a later covenant." *Garrett v. Coast and S. Fed. Sav. and Loan Ass'n.*, 9 Cal. 3d 731, 738 n.6 (1973). In *Garrett*, borrowers challenged a bank's imposition of late charges on outstanding loan balances as penalties in violation of California law. The bank countered that the late fees (in the form of additional interest) charged to the borrowers "merely [gave] a borrower an option of alternative performance of his obligation." *Id.* at 735. The California Supreme Court rejected the bank's characterization of the late fees, finding that California courts have "consistently ignored form and sought out the substance of arrangements which purport to legitimate penalties and forfeitures." *Id.* at 737. Verizon Wireless's argument is similar to the bank's in *Garrett* in that it contends that the Plaintiffs are merely electing to exercise alternative performance under the contract -- reactivation. Like the *Garrett* Court, this Court finds the most prudent approach is to ascertain the substance of the parties' arrangements. In sum, Plaintiffs have sufficiently alleged that the reconnect fee is triggered by breach.

2. The Reconnect Fee is Fixed and Certain.

Next, the Court must determine whether the $15 charge is "fixed and certain" within California's definition of liquidated damages. Under California law, liquidated damages involve "a sum of which is fixed and certain by agreement." *Chodos*, 292 F.3d at 1002. The requirement that liquidated damages be fixed and certain arises out of the concern that parties possess some degree of certainty regarding their liability in the event of a breach. *See Better Food Markets, Inc. v. Am. Dist. Tel. Co.*, 40 Cal. 2d 170, 184 (1953) (rejecting a challenge to a

liquidated damages provision on the basis that damages would have been impracticable or extremely difficult to ascertain at the time the parties entered into a service contract for a burglary alarm system). Plaintiffs assert that the sum of the reconnect fee satisfies this requirement, as they and the purported subclass were each charged the same $15 sum to reconnect their service. Verizon Wireless maintains that the reconnect fee fails to satisfy this requirement, and points out that the reconnect fee does not apply to each customer whose services have suspended, but only to those who elect to reactivate service.

Verizon Wireless contends the reconnect fee is not fixed and certain because it applies only to some customers: those with suspended service who elect to reactivate their accounts. Because some customers may elect to terminate their contract and pay an early termination fee, rather than pay the reconnect fee and reactivate their service, Verizon Wireless argues the manner in which the reconnect fee is applied is neither fixed nor certain. Plaintiffs counter that "[t]he choice between one liquidated damages fee (the early termination fee) or another (the reconnect fee) is no choice at all." (Opp. Br. at 7.) Further, Plaintiffs point out that the fixed and certain requirement explicitly concerns the *sum* of the liquidated damages; it does not require that the *application* of liquidated damages be fixed and certain. (*Id.*) The Court finds that the fixed and certain requirement, as articulated by California case law, concerns the sum, and not the application, of liquidated damages. *See Kelly v. McDonald*, 98 Cal. App. 121, 125 (1929) ("[t]he term 'liquidated damages' is used to indicated an amount of compensation to be paid in the event of a breach of contract, *the sum of which is fixed and certain* by agreement") (emphasis added), *overruled in part on other grounds, McCarthy v. Tally*, 46 Cal. 2d 577 (1956). Here, Plaintiffs and the purported subclass members allege to have all paid the same amount for reconnection. Although the Customer Agreement does not specify the specific amount, all customers electing to reconnect suspended service are charged the same $15 fee. Although Verizon Wireless could presumably increase or decrease the sum under its Customer Agreement, were it do so, the same flat fee would be charged to all customers reconnecting suspended service, resulting in a sum that is both fixed and certain. Therefore, a customer entering into an agreement with Verizon Wireless is certain as to his liability in the event of

breach, which is one of the primary purposes of liquidated damages provisions. If a customer's service is suspended due to nonpayment, the Customer Agreement provides that he is subject to a reconnect fee, and this fee is the same for all customers similarly situated. (*See* TAC at ¶ 10.) In sum, Plaintiffs have adequately alleged facts demonstrating that the reconnect fee is fixed and certain. Therefore, the Court concludes that the reconnect fee constitutes liquidated damages and finds that Plaintiffs have alleged sufficient facts in support of their Section 1671 claim.

CONCLUSION

For the foregoing reasons, the Court DENIES Verizon Wireless's motion to dismiss.

IT IS SO ORDERED.

Dated: March 18, 2009

JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NANCY H. SWEETNAM and JAN CADY, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

T-MOBILE USA, INC., a Delaware corporation,

Defendant.

CASE NO. C06-1463RSM

ORDER ON MOTION TO STAY PROCEEDINGS

This matter is now before the Court for consideration of defendant's motion to stay these proceedings until the resolution of administrative proceedings currently pending before the Federal Communications Commission (FCC). Dkt. #14. The Court deems oral argument on this motion unnecessary. For the reasons set forth below, the motion shall be granted.

BACKGROUND

Plaintiffs have sued defendant, T-Mobile USA, Inc., on behalf of themselves and a proposed class consisting of T-Mobile wireless service customers who were charged an Early Termination Fee (ETF). According to plaintiffs, defendant charges an ETF, typically $200.00, to wireless customers who cancel their service contracts early, regardless of their reason for cancelling. Plaintiffs contend that defendant's

ETF is an illegal liquidated damages provision, which is not a reasonable measure of actual or anticipated loss caused by termination, but rather a disguised fee that has "the effect and purpose of locking in . . . subscribers." Amended Complaint, ¶¶ 17, 19) Plaintiffs allege that defendant's practice is "unjust, unconscionable, unlawful, unfair and deceptive . . . ," violating the Washington Consumer Protection Act and similar laws of other states. *Id.* at ¶ 4, 22. Plaintiffs further allege state law claims for unjust enrichment, money had and received, and declaratory relief. Defendant has not yet filed an answer to the complaint, contending that the matter should be stayed pending administrative proceeding before the FCC under the primary jurisdiction doctrine.

In support of the motion to stay, defendant has provided the Court with two FCC Public Notices and two petitions filed with the FCC, and requests that the Court take judicial notice of them. *See* Dkt. #14-2, Ex. A, B, F & G. On May 18, 2005, the FCC issued two public notiees seeking comment on petitions filed with the Commission. One notice was issued in response to a petition filed by the Cellular Telecommunications & Internet Association (CTIA). Dkt. #14-2, Ex. A; *see also* Public Notice, 70 Fed. Reg. 38928 (July 6, 2005). On March 15, 2002, CTIA filed a petition for expedited ruling and requested the FCC to declare that ETFs in wireless service contracts are "rates charged" within the meaning of 47 U.S.C. § 332(c)(3)(A). Dkt. #14-2, Ex. G. CTIA also requested the FCC to declare that "any application of state law by a court . . . to invalidate, modify, or condition the use or enforcement of [ETFs] based . . . upon an assessment of reasonableness, fairness, or cost-basis of the [ETF], or to prohibit the use of [ETFs] as unlawful liquidated damages or penalties, constitutes prohibited rate regulation preempted by Section 332(c)(3)(A)." Dkt. #14-2, Ex. A.

The second public notice was issued in response to a petition filed on February 22, 2005, by SunCom Wireless Operating Company, LLC, pursuant to a court order in *Edwards v. SunCom*, a class action lawsuit filed in a South Carolina state court. Dkt. #14-2, Ex. B; *see also* Public Notice, 70 Fed. Reg. 38926 (July 6, 2005). Similar to the CTIA petition, SunCom's petition requested the FCC to declare that ETFs charged to commercial mobile radio service customers are "rates charged" under section 332(c)(3)(A). *See* Dkt. #14-2, Ex. F.

The Court takes judicial notice of the petitions and the public notices to the extent that they indicate that the FCC has commenced proceedings with respect to whether ETFs are preempted "rates charged" within the meaning of 47 U.S.C. § 332(c)(3)(A).

DISCUSSION

The doctrine of primary jurisdiction is a prudential doctrine "concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *Nadar v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303 (1978) (internal quotes and citation removed). The doctrine "allows a federal court to refer a matter extending beyond the 'conventional experiences of judges' or 'falling within the realm of administrative discretion' to an administrative agency with more specialized experience, expertise, and insight." *National Communications Association, Inc. v. AT&T*, 46 F.3d 220, 222–23 (2d Cir. 1995) (citing *Far East Conference v. United States*, 342 U.S. 570, 574 (1952)). However, the doctrine is not "intended to 'secure expert advice' for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit." *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002). "Primary jurisdiction is properly invoked when a claim is cognizable in federal court but requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency." *Id.*

There is no fixed formula for applying the doctrine of primary jurisdiction. *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 64 (1956). However, the Ninth Circuit Court of Appeals has traditionally considered the presence of four factors when determining whether the doctrine of primary jurisdiction is properly invoked. *Davel Communications, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086 (9th Cir. 2006). These factors are "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration." *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987).

The first factor, the need to resolve an issue, favors application of the primary jurisdiction doctrine. In their complaint, plaintiffs assert that defendant's ETF is "not a rate charged," but is "part of the 'Terms and Conditions.'" Dkt. #4, at ¶ 21. This characterization of defendant's ETF is crucial to plaintiffs' state law claims, because the FCA expressly preempts state regulation of "rates charged," but not of "other terms and conditions." 47 U.S.C. § 332(c)(3)(A). According to § 332(c)(3)(A), "no State or local government shall have any authority to regulate . . . the rates charged by any commercial mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." *Id.*

Plaintiffs argue that the FCA's preemptive powers are limited and do not apply to the state law claims in this case. Plaintiffs are correct in that the FCA does not appear to preempt all state law causes of action. *See, e.g.,* 47 U.S.C. § 332(c)(3)(A) (states may regulate "other terms and conditions of commercial mobile services"); § 414 ("Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies"); *see also In the Matter of Wireless Consumers Alliance, Inc.*, 15 FCCR 17021, 17022 ("monetary damages by state courts based on state consumer protection, tort, or contract claims" are not generally preempted by section 332).

However, it is not clear whether a wireless service provider's ETFs, which are at issue in this case, are within the preemptive scope of "rates charged." Those few federal courts which have considered the matter appear to be split on the issue. *Compare Phillips v. AT&T Wireless*, 2004 U.S. Dist. LEXIS 14544 (S.D. Iowa 2004) (finding that early termination fees are other terms and conditions, not rates charged), *with Chandler v. AT&T Wireless Services, Inc.*, 2004 U.S. Dist. LEXIS 14884 (S.D. Ill. 2004) (finding that early cancellation fee is a rate charged). In addition, the FCC is currently engaged in proceedings to determine this very issue. *See* Public Notice, 70 Fed. Reg. 38928 (July 6, 2005); Public Notice, 70 Fed. Reg. 38926 (July 6, 2005).

In this case, there is a need to resolve whether ETFs fall within the preemptive scope of "rates charged." Resolution of this issue may be determinative of whether plaintiffs can proceed with their state

law claims. Plaintiffs contend that whether or not an ETF is a rate is irrelevant to whether the defendant acted unreasonably in violation of the FCA and Washington consumer protection law. However, plaintiffs have not specifically raised a claim under the FCA. Moreover, if the FCC determines that ETFs are within the scope of "rates charged," then plaintiffs' consumer fraud claims may be preempted. This factor favors the application of primary jurisdiction.

The second and third *General Dynamics* factors also weigh in favor of invoking the primary jurisdiction doctrine. Congress granted the FCC authority to execute and enforce the provisions of the FCA. 47 U.S.C. § 151. The FCC has the authority to interpret provisions of the FCA, and courts defer to the Commission's lawful interpretations of the Act. *See, e.g., National Cable & Telecommunications Association v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005). This case calls for an interpretation of the FCA, a matter which is in the jurisdiction of the FCC. It is appropriate to defer to the FCC's interpretation.

The fourth factor, agency expertise and uniformity, also weighs in favor of deferring to the FCC under the primary jurisdiction doctrine. Plaintiffs argue that the issues in this case involve questions of consumer deception and fraud—matters within the conventional competence of the courts—rather than technical matters requiring the specialized knowledge or competence of the FCC. However, as stated above, the potentially determinative issue that needs to be resolved first is the preemptive scope of "rates charged" under the FCA. While this type of statutory interpretation may also lie within the conventional competence of courts, more commonly the courts have referred similar questions of statutory interpretation to administrative agencies under the doctrine of primary jurisdiction. *See, e.g., In re Starnet, Inc.*, 355 F.3d 634 (7th Cir. 2004); *Mical Communications, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031 (10th Cir. 1993).

In *Starnet*, the Seventh Circuit invoked the doctrine of primary jurisdiction and referred a matter to the FCC to clarify ambiguity in the term "location" in the Telecommunications Act as it applied to the portability of telephone numbers. *Starnet*, 355 F.3d at 639. In *Mical*, the Tenth Circuit also invoked the doctrine and referred a matter to the FCC to determine whether billing and collection within the context

of area code 900 numbers was within the scope of section 202 of the FCA. *Mical*, 1 F.3d at 1039–1040. These cases arguably involved matters that required more technical sophistication on the part of the FCC than the "rate" issue presented here. However, both courts ultimately determined that the FCC's expertise and familiarity with the regulated industry weighed in favor of invoking primary jurisdiction, even in matters of statutory interpretation. *See Starnet*, 355 F.3d at 639; *Mical*, F.3d at 1039–1040. Similarly, the FCC's specialized experience, expertise, and insight with respect to rates for mobile service providers will be instructive in this case. This appears particularly so in light of the legislative history of the FCA:

> To foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure, new section 332(c)(3)(A) also would preempt state rate and entry regulation of all commercial mobile services. States may petition the FCC for authority to regulate the rates for commercial mobile services under specified circumstances.

H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

In addition, the need for uniformity in administration is of particular relevance in this case. As the Ninth Circuit has stated, "[i]t is precisely the purpose of the primary jurisdiction doctrine to avoid the possibility of conflicting rulings by courts and agencies concerning issues within the agency's special competence." *Davel Communications, Inc.*, 460 F.3d at 1090. In this case, not only do the few court decisions available conflict as to whether ETFs are preempted rates, but also the FCC is currently considering this precise issue. Thus, the "real possibility that a decision by [the] court prior to the FCC's response . . . would result in conflicting decisions, either between our court and the FCC or our court and another circuit if the FCC ruling is appealed" weighs heavily in favor of invoking the primary jurisdiction doctrine. *Mical*, 1 F.3d at 1037.

Within the primary jurisdiction doctrine, "referral" is a term of art that means that the Court can either stay the proceeding or dismiss the case without prejudice. *Davel Communications, Inc.*, 460 F.3d at 1087 (citing *Syntek Semiconductor Co. v. Microchip Technology, Inc.*, 307 F.3d 775, 782 n.3 (9th Cir. 2002)). "There is no formal transfer

mechanism between the courts and the agency; rather, upon invocation of the . . . doctrine, the parties are responsible for initiating the appropriate proceedings before the agency." *Id.* In this case, since there are currently proceedings before the FCC that will resolve the precise issue of whether ETFs are preempted under the FCA, the Court shall stay the proceedings only until resolution of the proceedings currently before the FCC.[1]

Plaintiffs have argued that in the event that the Court does impose a stay, it should be a partial one, allowing discovery and class certification to proceed. Although there does not appear to be a general prohibition against granting partial stays in cases of primary jurisdiction, plaintiffs do not present a compelling reason to do so in this case. The only authority that plaintiffs submit in support of their proposition is an order from the Superior Court of California. *In re Cellphone Termination Fee Cases*, J.C.C.P. 4332 (Sup. Ct. Cal. June 16, 2005); Dkt. #16-2. The Superior Court in that case invoked the primary jurisdiction doctrine to stay an ETF class action lawsuit in light of the very same FCC proceedings of interest in this case. The court acknowledged that granting a partial stay upon invocation of primary jurisdiction was novel, but the court was concerned with potential prejudice to the parties caused by an indefinite delay, particularly when the parties had already resolved many pleading issues and exchanged substantial discovery. *Id.* Here, the ETF issue pending before the FCC may be determinative of whether plaintiffs' state law claims can proceed. Therefore, it is prudent for the parties and the Court to await the ruling of the FCC before continuing with this case.

CONCLUSION

The *General Dynamics* factors all weigh in favor of applying the doctrine of primary jurisdiction in this case. The Court declines to adopt plaintiffs' suggestion that discovery and class

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[1] Defendant has provided the Court with a copy of a recent order issued by the District Court of the Central District of California. *Gentry v. Cellco*, No. CV-05-7888 (C.D. Cal. Mar. 23, 2006); Dkt. #14-2, Ex. C. That case, similar to the instant case, involves a class action lawsuit based on state law claims against a mobile service provider's practice of charging ETFs. In *Gentry*, the court conducted a similar primary jurisdiction analysis to the one presented above and decided to stay the case until resolution of the pending FCC proceedings. The court also exercised its inherent ability to control its docket. The Court finds in this well-reasoned decision support for the decision to stay these proceedings.

certification be allowed to proceed. Accordingly, defendant's motion stay the proceedings until resolution of the current FCC proceedings is GRANTED. The Clerk shall administratively close this action and indicate on the docket that it is STAYED. Counsel may move to lift the stay promptly upon conclusion of proceedings before the FCC.

Dated this 14th day of June, 2007.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHERYL BARAHONA and KUBA OSTACHIEWCZ, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

T-MOBILE USA, INC.,

Defendant.

CASE NO. C08-1631RSM

ORDER ON MOTION TO DISMISS OR STAY THIS ACTION

This matter is before the Court for consideration of defendant's motion to dismiss or, in the alternative, to stay this action. Dkt. # 24. Plaintiffs have opposed the motion, and the Court has fully considered the parties' memoranda and supplemental filings. Defendant's motion shall be granted in part, and denied in part, as set forth below.

BACKGROUND

Plaintiffs Cheryl Barahona and Kuba Ostachiewcz, residents of California, bring this action on behalf of themselves and all others similarly situated, to challenge the fees charged by defendant T-Mobile USA ("T-Mobile") for late payment of bills for cellular phone service. The late fee amount is $5.00 or 1.5% per month of the outstanding balance, whichever is greater. Plaintiffs contend that this late fee provision is void and unenforceable under California Civil Code § 1671, and violates other specified

provisions of California law.[1]

Defendant has moved to dismiss the action for failure to state a claim or, in the alternative, to stay the action and refer it to the Federal Communications Commission ("FCC") pursuant to the doctrine of primary jurisdiction. Defendant asserts that the late fee is a "rate" over which the FCC has exclusive jurisdiction pursuant to the Federal Communications Act ("FCA"), 47 U.S.C. § 332. Plaintiffs have opposed the motion, contending that the late fee is not a "rate" but rather a term or condition of service which may be subject to state regulation.

DISCUSSION

Section 332(c)(3)(A) of the FCA grants the Federal Communications Commission ("FCC") exclusive authority over the rates of wireless carriers, providing that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service." 47 U.S.C. § 332(c)(3)(A). The Act further provides, however, that "this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." *Id.* Thus, while a state may not regulate a wireless carrier's "rates," it may regulate "other terms and conditions" of wireless service. Resolution of defendant's motion turns on whether the late fees are "rates" subject to the primary jurisdiction of the FCC.

The doctrine of primary jurisdiction "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303 (1976). The doctrine is properly invoked when enforcement of a claim in court would require resolution of issues that have already been placed within the special competence of an administrative body. In a frequently quoted passage, Justice Frankfurter described the following circumstances where the doctrine is to be applied:.

> [I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over .... Uniformity and consistency in

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[1]Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*; Unfair Business Practice Act, Cal. Bus. & Prof. Code § 17200 *et seq.*; and Cal. Civil Code §§ 223, 224, and 3517. Complaint for Damages and Injunctive Relief, Dkt. # 1.

> the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Far East Conference v. United States, 342 U.S. 570, 574-75 (1952).

The doctrine is applied on a case-by-case basis, considering several factors. First, the court should examine "whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *United States v. Western Pac. R. Co.*, 352 U.S. 59, 64 (1956). Second, the court must determine if uniformity is desirable and could be obtained through administrative, rather than judicial, review. *Id.* (citing *Texas & Pac. Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907)). Finally, the court considers the "expert and specialized knowledge of the agencies involved ...." *Western Pac.*, 352 U.S. at 64.

The Court finds, in applying these factors here, that the doctrine of primary jurisdiction is applicable. Regulation of wireless telephone services, particularly the rates charged, is a matter that Congress has placed within the special competence of the FCC. 47 U.S.C. § 332(c)(3)(A). It follows that determination as to whether the late fee is a "rate charged" is also within the special competence of the FCC. Further, it is an area in which there is a need for uniformity. If this Court were to consider the reasonableness of Defendants' challenged billing practice, issues related to the regulation of these services would necessarily be involved. Allowing the FCC to first consider whether defendants' late payment charges are "rates" within the meaning of the Communications Act is thus consistent with the purposes of the primary jurisdiction doctrine. Congress has created this agency to regulate the subject matter at issue here. Should the FCC determine that the late fees are "rates," the agency's expertise should be applied to determine whether the fees are "reasonable" and "just."

Referral of this matter to the FCC will also promote uniformity and consistency in its regulation of the telecommunications industry. Uniformity is very much at issue here, as the parties have pointed to court decisions which have taken opposite positions on the matter of late fees and whether they are

"rates" within the meaning of § 332 of the FCA. Defendant cites *Kiefer v. Paging Network, Inc.*, 50 F. Supp. 2d 681 (E.D.Mich. 1999), in which the district court applied the doctrine of primary jurisdiction and referred to the FCC the question of whether the late fees charged by defendant, a provider of paging services, were reasonable. *Id.* at 681. In so doing, the court necessarily found that the late fees were "rates" subject to the application of the doctrine of primary jurisdiction. The FCC subsequently determined that the late fees – which were the same as those charged by defendant here---were reasonable. *In the Matter of Kiefer*, FCC File No. EB-00-TC-F-002 (October 18, 2001). Defendant's request that this action be dismissed is based on the assertion that the *Kiefer* decision by the FCC is determinative of the issues presented here.

Plaintiffs, on the other hand, argue that the late fee is a penalty, not a rate, and assert that "[a]lmost every court analyzing whether the term "rate" permits cellular carriers to impose unlawful penalties has found Congress did not intend section 332 to have such a broad preemptive effect." Plaintiffs' Opposition, Dkt. # 25, p. 2. Plaintiffs cite to *Gellis v. Verizon Communications, Inc.*, Cause No. C07-3679 JSW (N.D.Cal. 2007), in which the district court denied a defense motion to dismiss, finding that the plaintiffs' challenge to late fees imposed by Verizon Wireless was not preempted by section 332. *Id.*, Dkt. # 32, p. 6. The California district court distinguished *Kiefer* by noting that the Michigan case involved a challenge under federal law, Section 201(b) of the FCA, rather than a challenge under state law. *Id.* at 4. The plaintiffs in *Gellis* subsequently amended their complaint to include a challenge to both late fees and reconnect fees. A second motion to dismiss was recently denied by the district court. *Id.*, Dkt. # 73. A motion for certification of the two dismissal orders for interlocutory appeal under 28 U.S.C.§ 1292(b) is pending. *Id.*, Dkt. # 79.

In view of the disparity between the cases cited by the parties, the Court finds that the interest of uniformity weighs heavily in favor of deferring to the expertise of the FCC under the primary jurisdiction doctrine. The FCC's determination as to whether defendant's late payment charge is a "rate" and if it is, whether the rate is reasonable, will necessarily guide similar suits against other telecommunication providers. It will likewise guide any decision by this Court regarding plaintiff's state law claims. Thus,

use of the primary jurisdiction doctrine and referral to the FCC will avoid disparate or conflicting requirements for telecommunication providers, and promote uniformity.

Accordingly, it is hereby ORDERED:

Defendant's alternative motion to stay proceedings is GRANTED. Under the doctrine of primary jurisdiction, this matter is STAYED and REFERRED to the FCC for a determination as to whether the late fees charged by defendant are "rates", and if so, whether they are reasonable under applicable law.

Plaintiffs shall be responsible for initiating proceedings before the FCC. Plaintiffs shall file in this Court, within six months of this date and each six months thereafter, a status report regarding the progress of the proceedings before the FCC.

Dated this 15th day of May, 2009.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

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